Malayan Banking Berhad v Basarudin Ahmad Khan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–59 OF 2002
GOPAL SRI RAM, ABDUL KADIR SULAIMAN DAN ABDUL AZIZ JJCA
23 AUGUST 2004

Contract — Employment contract — Breach — Employee's duties to employer — Duty to perform with due care and skill — Breach of contract — Distinction between warranty and indemnity — Damages — Essential ingredients — Loss — Whether to be proven

Contract — Indemnity — Effect of — Distinction between warranty and indemnity — Damages — Essential ingredients — Loss — Whether to be proven

The respondent (defendant) was a branch manager at the appellant (plaintiff) bank in Tanah Merah. The defendant had executed a fidelity contract. The plaintiff contended that the defendant had committed three breaches of his contractual duties. Firstly, the defendant had approved loans for joint borrowers who were not family members when there was a standing instruction not to do so. Secondly, he failed to comply with the condition that the limit of a loan should be gradually reduced. Thirdly, he breached his implied contractual duty of care and skill by grossly over-valuing property offered by customers as collateral to loans advanced by the plaintiff. Further, the plaintiff claimed that it failed to recover loans advanced in consequence of the defendant's breach. The High Court found that the defendant was in breach of contract in that he had breached an implied term as to care and skill. The judge nevertheless dismissed the plaintiff's claim on the ground that the plaintiff had not proved its losses. Hence, this appeal by the plaintiff.

Held (dissenting), allowing the appeal:

(1) At the commencement of the trial the parties agreed that the trial was only for determining the liability of the plaintiffs, which meant that they had agreed that it was a liability that did not require for its establishment proof of loss or damage. By that agreement the defendant impliedly abandoned his defence in para 5 of his amended statement of defence. The defendant could not, while agreeing that his liability, if any, could be established without proof of loss or damage, continue to maintain that defence (see para 8).

(2) As the plaintiffs' claim was not a claim under a right to indemnity but was a claim for breach of contract, the sole point of the defendant has no basis, and for that reason this appeal was allowed and damages to be assessed (see para 9).

[**Bahasa Malaysia summary**

Responden (defendan) adalah seorang pengurus cawangan plaintif di bank perayu (plaintif) di Tanah Merah. Defendan menandatangani kontrak kesetiaan. Plaintif mengadu bahawa defendan telah memungkiri tiga tanggungjawab kontraknya. Pertamanya, defendan telah meluluskan pinjaman bagi peminjam bersama yang bukan sekeluarga bila mana terdapat arahan yang menghalangnya daripada berbuat demikian. Keduanya, dia gagal mematuhi syarat bahawa had pinjaman harus dikurangkan mengikut tahap. Ketiganya, dia telah memungkiri tanggungjawab kontrak tersirat untuk berjaga-jaga dan mahir. Tambahan pula, plaintif menuntut bahawa dia gagal untuk mengutip balik pinjaman kerana kemungkiran kewajipan defendan. Mahkamah Tinggi memutuskan bahawa defendan telah memungkiri kontraknya kerana defendan telah memungkiri syarat tersirat untuk berjaga-jaga dan mahir. Walau bagaimanapun, hakim menolak tuntutan plaintif atas alasan bahawa plaintif tidak membuktikan kerugiannya. Maka rayuan ini dibuat.

Diputuskan (menentang), membenarkan rayuan tersebut:

(1) Pada permulaan perbicaraan, pihak-pihak telah bersetuju bahawa perbicaraan hanyalah untuk menentukan liabiliti pihak plaintif, yang bermakna bahawa ia adalah suatu liabiliti yang tidak memerlukan pembuktian kerugian atau kehilangan. Melalui perjanjian tersebut, defedan boleh dikatakan telah mengabaikan pembelaannya di perenggan 5 pernyataan pembelaannya yang telah dipinda. Defendan tidak boleh, sambil bersetuju bahawa liabilitinya, sekiranya wujud, boleh dibuktikan tanpa keterangan kerugian atau kehilangan, terus memakai pembelaan tersebut (lihat perenggan 8).

(2) Oleh sebab tuntutan plaintif bukanlah suatu tuntutan di bawah hak untuk indemniti tetapi adalah tuntutan untuk kemungkiran kontrak, isu utama defendan tidak berasas, dan oleh sebab itu rayun ini dibenarkan dan ganti rugi perlu ditaksirkan (lihat perenggan 9).]

[**Editorial Note:** This dissenting judgment of His Lordship Abdul Aziz JCA, is to be read together with the majority judgment which was reported earlier at [2005] 1 MLJ 210.]

Abdul Aziz JCA (delivering dissenting judgment):

[1] I too will refer to the appellant bank and the respondent as plaintiffs and defendant respectively.

[2] The only point raised by the defendant's counsel in his oral submission in resisting this appeal is that the contract dated 16 June 1979 between the plaintiffs and the defendant and entitled Employee's Service Agreement was a contract of indemnity and that therefore in order to establish the defendant's

liability in this case the plaintiffs must prove their losses, which they have not done.

[3] The relevant parts of the contract have been read out by my learned brother, Gopal Sri Ram JCA. There are essentially two parts to the contract. The first part is essentially a promise by the defendant to serve the plaintiffs faithfully. The second part is a promise by the defendant — a pay-and-make-good promise — to compensate the plaintiffs for any loss suffered by them as a result of the defendant's failure to fulfil any of his promises in the first part. All these promises were made in consideration of the plaintiffs employing the defendant.

[4] It was contended by the defendant's counsel, and this was not disputed by the plaintiffs' counsel, that the pay-and-make-good promise was a contract of indemnity as defined in s 77 of the Contracts Act 1950 or was a promise that made the Employee's Service Agreement a contract of indemnity.

[5] The plaintiffs' counsel may be right in his sole point if the plaintiffs' claim in this case was a claim under a right to the indemnity given in the contract. But the plaintiffs' claim was not such a claim. It was a claim for breach of contractual duty of care. The plaintiffs chose to found their cause of action not on the indemnity but on breach of contract and were seeking damages for breach of the defendant's contractual duty of care. The Employee's Service Agreement, but for the fact that it contained an indemnity clause, was an ordinary contract in which, for a consideration, the defendant made certain promises, that is, promises that amounted to a promise to serve the plaintiffs faithfully. A breach of that contract would constitute a cause of action for the plaintiffs. To establish liability the plaintiffs did not have to prove their losses or damages, the right to which would be a right consequential and incidental to the breach. For that right the plaintiffs could rely on the pay-and-make-good promise as an express stipulation of what the defendant would bear in consequence of the breach. Or if they could not rely on that promise they could rely on the consequential right to compensation given by s 74(1) of the Contracts Act 1950, and they might get the same amount of compensation as the indemnity, because as Fry LJ stated in *Birmingham & District Land Co v London and North Western Railway Company* (1886) 34 Ch D 261 at p 276, 'when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages'.

[6] That the plaintiffs chose to found their action on breach of contract and not on indemnity is borne out by the manner in which their statement of claim was framed. It was framed as a claim for breach of contract and not as a claim of right to the indemnity. It set out the defendant's promises, then the defendant's breach, and ended by averring that as a result of the breach the plaintiffs suffered loss and damage.

[7] It is true that because the plaintiffs, in setting out in their statement of claim the various promises of the defendant, also set out the pay-and-make-good promise, the defendant in para 5 of his amended statement of defence contended that the plaintiffs could not rely on the pay-and-make-good promise until the plaintiffs had ascertained their ultimate losses. That must have been a defence that viewed the pay-and-make-good promise as an indemnity and that treated the plaintiffs' claim as one under the right to the indemnity. But as I said that was not the plaintiffs' claim.

[8] At the commencement of the trial the parties agreed that the trial was only for determining the liability of the plaintiffs, meaning that they agreed that it was a liability that did not require for its establishment proof of loss or damage. That was confirmed by the respondent's counsel at the end of the trial when he said, according to the judge's notes 'I agree plaintiff has not proved loss or damages which accrued to plaintiff because at the outset parties agreed this proceeding to determine liability only'. That agreement is one of great significance as indicating that the defendant realized and accepted — and correctly too — that the plaintiffs' claim was one for breach of contract, the establishment of which did not require proof of loss or damage. By that agreement the defendant impliedly abandoned his defence in para 5 of his amended statement of defence. The defendant could not, while agreeing that his liability, if any, could be established without proof of loss or damage, continue to maintain that defence.

[9] As I am of the view that the plaintiffs' claim was not a claim under a right to indemnity but was a claim for breach of contract, the sole point of the defendant has no basis, and for that reason I would allow this appeal and order damages to be assessed.

[10] As to the two motions mentioned by my learned brother, they have already been disposed of during the hearing of the appeal. By a unanimous decision, the plaintiffs' motion was allowed and the defendant's motion was dismissed. There is nothing further to decide on the motions, except the costs in respect of the defendant's motion, as regards which we omitted to make any express order. I agree with my learned brother that the costs of that motion be paid by the defendant to the plaintiffs.

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